

REMARKS/ARGUMENTS

The Applicants respectfully request reconsideration of the present Application in view of the following remarks. The status of the claims are as presented in Applicants' Amendment of December 28, 2005, and it should be noted that the claims status is different from that recited by the last Office Action, which states that claims 1-98 are pending with claims 13, 31, 50, 85, and 97. In fact, the presently rejected claims 1-9, 14-22, 26, 32-37, 41-45, 51-57, 61-84, 86-96 and 98 are the only claims pending in the present case, with the remaining claims having been cancelled by Applicants' prior Amendments in the present case.

I. DOUBLE PATENTING

In the sole ground of rejection, the Examiner has maintained a provisional rejection of claims 1-9, 14-22, 26, 32-37, 41-45, 51-57, 61-84, 86-96 and 98 under the judicially created doctrine of obviousness-type, nonstatutory double patenting in view of claims 1-16 of co-pending Application No. 11/370,653. This rejection is improper as set forth in M.P.E.P. § 804, and the present application should be allowed as it is impermissible to maintain a provisional double patenting rejection as the only ground of rejection.

1. Nonstatutory Double Patenting Rejections

If a "provisional" nonstatutory obviousness-type double patenting (ODP) rejection is the only rejection remaining in the earlier filed of the two pending applications, while the later-filed application is rejectable on other grounds, the examiner should withdraw that rejection and permit the earlier-filed application to issue as a patent without a terminal disclaimer. If the ODP rejection is the only rejection remaining in the later-filed application, while the earlier-filed application is rejectable on other grounds, a terminal disclaimer must be required in the later-filed application before the rejection can be withdrawn.

M.P.E.P. 804 I.B.1 (MPEP E8r4 2005), http://www.uspto.gov/web/offices/pac/mpep/documents/0800_804.htm#sect804.

The current application was filed on 9/26/2003, whereas Appl. No. 11/370,653 was filed on 3/8/2006, so in light of the above MPEP provision, the present rejection cannot be maintained. At present, there are five pending continuations from the parent to the present application. The parent case is Patent No. 6,650,890 (stemming from Application No. 09/675,609), and a terminal disclaimer is on file in the present application relative to the parent. The present application is the earliest filed of the five pending continuations of the '890 patent, as reflected in the table below:

10/672,688 filed on 09-26-2003 which is Pending claims the benefit of 09/675,609
10/965,610 filed on 10-14-2004 which is Pending claims the benefit of 09/675,609
11/194,431 filed on 08-01-2005 which is Pending claims the benefit of 09/675,609
11/276,924 filed on 03-17-2006 which is Pending claims the benefit of 09/675,609
11/370,653 filed on 03-08-2006 which is Pending claims the benefit of 09/675,609

Of the other pending cases, only 10/965,610 has been indicated as allowable, and an issue fee has been paid in that case. Applicants believe that the claims in the '610 application are patentably distinct relative to the present application, and so a terminal disclaimer should not be warranted relative thereto. Further, given that none of the other applications – 10/965,610, 11/276,924, 11/370,653 – have been indicated as allowable, none of these cases can be material to patentability in the present case, given that the present case is the earliest filed application and that the present case only stands rejected under provisional nonstatutory double patenting grounds.

In accordance with the above, Applicants believe that they have fully complied with 37 CFR 1.56 in all respects. As a precautionary measure, however, Applicants are submitting herewith an IDS listing the publications of all of the other “children” of the '890 patent. As a further measure to facilitate prosecution of the present application, and without admitting in any way that a terminal disclaimer is needed in the present application, Applicants are submitting

herewith a terminal disclaimer relative to the cited '653 application, which is the subject of the USPTO's present rejection in this application.

II. CONCLUSION

The Applicants respectfully submit that all pending claims are in condition for allowance, and request a Notice of Allowability for the pending claims. The Examiner is invited to contact the undersigned Attorney of Record if such would expedite the prosecution of the present Application. Although no fees are believed to be due with this Amendment, if it is determined that additional fees are due, or an overcharge has occurred, please charge or credit Deposit Account No. 13-0480, referencing the Attorney Docket Number specified herein.

Respectfully submitted,

/Brian C. McCormack/

Date: August 11, 2006

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